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ZMSB v PSB

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCC)(A)-2345–12 OF 2022
LEE SWEE SENG, AZMAN ABDULLAH AND CHOO KAH SING JJCA
4 NOVEMBER 2024

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Arbitration — Appointment of arbitrator — Objection — Delay to record an objection to the appointment of arbitrator — Whether the procedure for challenge of the appointment of arbitrator had been complied with — Whether there had been a waiver — Whether the appellant may reserve its right to have the challenge to the appointment of the arbitrator decided in the award when it is issued — Whether the award could be set aside on the ground that the composition of the tribunal was not in accordance with the arbitration agreement — Arbitration Act 2005 ss 7, 14, 15 & 37(1)(a)(vi)

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ZMSB and PSB had entered into a memorandum of agreement ('MOA') wherein payments were made by ZMSB to PSB for the iron ore extracted from the land in accordance with the agreement between the parties. The dispute was when the respondent PSB gave notice of appointment of arbitrator through its solicitor's letter dated 29 March 2018 to the solicitors for ZMSB proposing Mr XXX as the arbitrator of the said arbitration. The letter asked for a reply within seven days for their further action. There was a subsequent letter from PSB's solicitors to ZMSB dated 8 October 2018 where once again and this time enclosing the curriculum vitae, PSB proposed the appointment of Mr XXX as arbitrator pursuant to the court order of 14 December 2017. This time, PSB's solicitors gave the other side's solicitors 14 days to respond for their further action. PSB's solicitors by their letter dated 28 January 2019 to Mr XXX informed the said arbitrator of his appointment pursuant to cl 11 of the MOA dated 18 October 2012. The said solicitors also asked the arbitrator to confirm whether he would be agreeable to the appointment together with his scale of fees. Mr XXX by his letter dated 12 December 2019 to ZMSB, duly informed ZMSB of his nomination to act as arbitrator to hear the dispute between ZMSB and PSB. He further declared that he had no dealings whatsoever with the parties in the past and present. He further wrote to ask whether there was no objection to his nomination, then, he shall proceed to fix a preliminary meeting (case management) on 13 March 2019 at 10 o'clock in the morning at the Asian International Arbitration Centre ('AIAC'). Then, there was a long lapse of silence and it was only by a letter dated 10 July 2019 that the new solicitors for ZMSB, Jeeva Partnership, wrote to the director of AIAC quoting cl 11 of the MOA and drawing the attention of AIAC to the fact that the appointment of the arbitrator must be made by the President of the

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Board of Engineers, Malaysia. At the first day of hearing, the solicitors for ZMSB did not expressly raise any objection on the appointment of Mr XXX as arbitrator. Rather, their first objection to his appointment as an arbitrator was made on 10 July 2019 by way of a letter to the Director of AIAC which is some three months after the date fixed for the first preliminary meeting on 13 March 2019. The notice of objection was wrongly addressed to the Director of AIAC as AIAC had nothing to do with the arbitration other than it being the physical place of meeting for the purpose of the arbitration hearing. AIAC is not the administrative body for the arbitration nor is it the appointing authority for the arbitration. The solicitors for ZMSB raised before the Director of AIAC the issue of non-compliance with the arbitration agreement on the appointment of Mr XXX as the arbitrator. It was only on 16 August 2019 that the solicitors for ZMSB wrote to the arbitrator to record its objection to his appointment as arbitrator. The issues in this appeal were: (a) whether the procedure for challenge under s 15 of the Arbitration Act 2005 ('the AA 2005') had been complied with; (b) whether there had been a waiver under s 7 of the AA 2005; (c) whether the appellant may reserve its right to have the challenge to the appointment of the arbitrator decided in the award when it is issued; and (d) whether the appellant can set aside the award under s 37(1)(a)(vi) of the AA 2005 on the ground that the composition of the tribunal was not in accordance with the arbitration agreement.

Held, dismissing the appeal with costs:

(1) The 15 days had long lapsed when the objection to the appointment of Mr XXX was first raised in writing by Jeeva Partnership's letter to Mr XXX dated 16 August 2019. The 15 days deadline had not been followed by ZMSB and thus the challenge on the arbitrator's appointment had not been validly made. The procedure to challenge the appointment of the arbitrator had not been complied with in accordance with the strict timeframe and procedure under s 15(1) of the AA 2005 and thus, the challenge had not been effectively made with the result that the arbitrator's appointment remained intact. The decision of the High Court was final as s 15(5) of the AA 2005 provided that no appeal shall lie against such a decision of the High Court (see paras 24 & 34).

(2) As a time limit was provided for raising a challenge on the appointment of an arbitrator under s 15(1) of the AA 2005 and as s 7(b) of the AA 2005 stated that if a time limit is provided for stating that objection, then if the party objecting does not do so within that period of time, then that party shall be deemed to have waived his right to object. The 15 days deadline having lapsed long time ago. Thus, the appellant ZMSB was deemed to have waived his right to object to the appointment of the arbitrator (see paras 37 & 44).

(3) The appellant could not claim the benefit of the exception to s 7 of the AA 2005 as there had been long and unexplained delay and more particularly the appellant had not raised the objection to the non-compliance of the appointment of the arbitration under the arbitration agreement within the timeframe of 15 days as stimulated under s 15(1) of the AA 2005 and was therefore deemed to have waived its right to object. Moreover, the appellant had proceeded with the arbitration in circumstance where if the final award is in its favour, the sting of his objection would have become irrelevant. It was for this reason that a party raising a serious objection on the appointment of an arbitrator must follow the strict procedure of s 15 of the AA 2005 for otherwise it would appear rather hollow an argument if it is only raised at the stage of setting aside an award only when the award is against the party raising the objection (see paras 46–47).

(4) The challenge on the composition of the arbitral tribunal being not in accordance with the agreement in s 37 of the AA 2005 application to set aside the award would only apply in situations where the party was only aware of the infirmity of the arbitral tribunal under s 14(3)(a) and (b) of the AA 2005 only after the award had been handed down. In this case, the appellant was fully aware and took the stand that the arbitrator was not validly appointed as it is the President of the Board of Engineers that should be appointing the arbitrator since the parties could not agree on the appointment of the arbitrator. By participating in the arbitration, the appellant could not effectively reserve its right to object only after the award had been delivered in case the award was not in its favour (see paras 62 & 70).

[Bahasa Malaysia summary

ZMSB dan PSB telah memasuki satu memorandum perjanjian ('MP') di mana pembayaran telah dibuat oleh ZMSB kepada PSB untuk bijih besi yang diekstrak dari tanah tersebut mengikut perjanjian antara pihak. Pertikaian timbul apabila responden PSB memberi notis pelantikan penimbang tara melalui surat peguamcaranya yang bertarikh 29 Mac 2018 kepada peguamcara ZMSB yang mencadangkan En XXX sebagai penimbang tara bagi timbang tara tersebut. Surat tersebut memohon jawapan dalam tempoh tujuh hari untuk tindakan selanjutnya. Terdapat surat seterusnya daripada peguamcara PSB kepada ZMSB bertarikh 8 Oktober 2018 di mana sekali lagi dan kali ini melampirkan curriculum vitae, PSB mencadangkan pelantikan En XXX sebagai penimbang tara menurut perintah mahkamah pada 14 Disember 2017. Kali ini, peguamcara PSB memberi peguamcara pihak satu lagi 14 hari untuk menjawab bagi tindakan selanjutnya. Peguamcara PSB melalui surat mereka bertarikh 28 Januari 2019 kepada En XXX memaklumkan penimbang tara tersebut mengenai pelantikannya menurut klausa 11 MP bertarikh 18 Oktober 2012. Peguamcara tersebut juga meminta penimbang tara untuk

mengesahkan sama ada beliau bersetuju dengan pelantikan itu bersama-sama dengan skala finya. En XXX melalui suratnya bertarikh 12 Disember 2019 kepada ZMSB, memaklumkan ZMSB dengan sewajarnya mengenai pencalonannya untuk bertindak sebagai penimbang tara untuk mendengar pertikaian antara ZMSB dan PSB. Beliau seterusnya mengisytiharkan bahawa beliau tidak mempunyai sebarang urusan dengan pihak-pihak tersebut sebelum ini dan semasa. Beliau seterusnya menulis untuk bertanya sama ada tiada bantahan terhadap pencalonannya, maka, beliau akan meneruskan untuk menetapkan mesyuarat awal (pengurusan kes) pada 13 Mac 2019 pada jam 10 pagi di Pusat Timbang Tara Antarabangsa Asia ('AIAC'). Kemudian, terdapat hela masa yang panjang dan hanya melalui surat bertarikh 10 Julai 2019 bahawa peguamcara baharu untuk ZMSB, Jeeva Partnership, menulis kepada pengarah AIAC yang memetik klausa 11 MP dan menarik perhatian AIAC kepada fakta bahawa pelantikan penimbang tara mesti dibuat oleh Presiden Lembaga Jurutera, Malaysia. Pada hari pertama pendengaran, peguamcara untuk ZMSB tidak secara nyata membangkitkan sebarang bantahan mengenai pelantikan En XXX sebagai penimbang tara. Sebaliknya, bantahan pertama mereka terhadap pelantikan beliau sebagai penimbang tara dibuat pada 10 Julai 2019 melalui surat kepada Pengarah AIAC iaitu kira-kira tiga bulan selepas tarikh yang ditetapkan untuk mesyuarat awal pertama pada 13 Mac 2019. Notis bantahan telah salah dialamatkan kepada Pengarah AIAC kerana AIAC tidak ada kaitan dengan timbang tara tersebut selain ia adalah tempat pertemuan fizikal untuk tujuan pendengaran timbang tara. AIAC bukanlah badan pentadbiran untuk timbang tara dan juga bukan pihak berkuasa untuk melantik timbang tara. Peguamcara untuk ZMSB membangkitkan kepada Pengarah AIAC isu ketidakpatuhan terhadap perjanjian timbang tara mengenai pelantikan En XXX sebagai penimbang tara. Hanya pada 16 Ogos 2019 bahawa peguamcara untuk ZMSB menulis kepada penimbang tara untuk merekodkan bantahannya terhadap pelantikannya sebagai penimbang tara. Isu dalam rayuan ini adalah: (a) sama ada prosedur untuk membantah di bawah s 15 Akta Timbang Tara 2005 ('ATT 2005') telah dipatuhi; (b) sama ada terdapat pengenepian di bawah s 7 ATT 2005; (c) sama ada perayu boleh merizabkan haknya untuk membantah terhadap pelantikan penimbang tara yang diputuskan dalam award apabila ia dikeluarkan; dan (d) sama ada perayu boleh mengetepikan award di bawah s 37(1)(a)(vi) ATT 2005 atas alasan bahawa komposisi tribunal tidak mengikut perjanjian timbang tara.

Diputuskan, menolak rayuan dengan kos:

(1) 15 hari telah lama berlalu apabila bantahan terhadap pelantikan En XXX pertama kali dibangkitkan secara bertulis melalui surat Jeeva Partnership kepada En XXX bertarikh 16 Ogos 2019. Tarikh luput 15 hari tidak diikuti oleh ZMSB dan dengan itu bantahan mengenai pelantikan penimbang tara tidak dibuat secara sah. Prosedur untuk membantah pelantikan penimbang tara tidak dipatuhi mengikut tempoh masa dan

prosedur yang ketat di bawah s 15(1) ATT 2005 dan dengan itu, bantahan itu tidak dibuat dengan berkesan dengan keputusan pelantikan penimbang tara masih kekal. Keputusan Mahkamah Tinggi adalah muktamad seperti s 15(5) ATT 2005 dengan syarat tiada rayuan boleh dibuat terhadap keputusan Mahkamah Tinggi tersebut (lihat perenggan 24 & 34).

(2) Memandangkan had masa diperuntukkan untuk mengemukakan bantahan mengenai pelantikan penimbang tara di bawah s 15(1) ATT 2005 dan seperti s 7(b) ATT 2005 menyatakan bahawa jika had masa diperuntukkan untuk menyatakan bantahan itu, maka jika pihak yang membantah tidak berbuat demikian dalam tempoh masa tersebut, maka pihak tersebut hendaklah dianggap telah mengetepikan haknya untuk membantah. Tarikh akhir 15 hari telah lama luput. Oleh itu, perayu ZMSB disifatkan telah mengetepikan haknya untuk membantah pelantikan penimbang tara (lihat perenggan 37 & 44).

(3) Perayu tidak boleh menuntut manfaat pengecualian kepada s 7 ATT 2005 kerana terdapat kelewatan yang lama dan tidak dapat dijelaskan dan lebih khusus perayu tidak membangkitkan bantahan terhadap ketidakpatuhan pelantikan timbang tara di bawah perjanjian timbang tara dalam tempoh 15 hari seperti yang diperuntukkan di bawah s 15(1) ATT 2005 dan oleh itu dianggap telah mengetepikan haknya untuk membantah. Selain itu, perayu telah meneruskan timbang tara dalam keadaan di mana jika keputusan akhir memihak kepadanya, bantahannya akan menjadi tidak relevan. Atas sebab inilah pihak yang mengemukakan bantahan serius mengenai pelantikan penimbang tara mesti mengikut prosedur ketat s 15 ATT 2005 kerana jika tidak, ia akan kelihatan agak kosong jika ia hanya dibangkitkan pada peringkat mengetepikan award hanya apabila award itu bertentangan dengan pihak yang membangkitkan bantahan (lihat perenggan 46–47).

(4) Bantahan mengenai komposisi tribunal timbang tara yang tidak mengikut perjanjian dalam s 37 ATT 2005 permohonan untuk mengetepikan award hanya akan terpakai dalam situasi di mana pihak itu hanya menyedari kelemahan tribunal timbang tara di bawah s 14(3)(a) dan (b) ATT 2005 hanya selepas award diberikan. Dalam kes ini, perayu sedar sepenuhnya dan mengambil pendirian bahawa penimbang tara tidak dilantik secara sah kerana ia adalah Presiden Lembaga Jurutera yang sepatutnya melantik penimbang tara memandangkan pihak-pihak tidak boleh bersetuju dengan pelantikan penimbang tara. Dengan mengambil bahagian dalam timbang tara, perayu tidak boleh merizabkan haknya untuk membantah secara berkesan hanya selepas award dibuat sekiranya award tidak memihak kepadanya (lihat perenggan 62 & 70).]

Cases referred to

Amanah Merchant Bank Bhd v Lim Tow Choon [1994] 1 MLJ 413; [1993] 1 MLRA 102, SC (refd)
ASM Shipping Ltd of India v TTMI Ltd of England [2006] 1 Llyod's Rep 401, QBD (refd)
Ken Grouting Sdn Bhd v RKT Nusantara Sdn Bhd and another appeal [2021] 4 MLJ 622, CA (refd)
Malaysian Airline System Bhd v Competition Commission and another appeal [2021] MLJU 2089; [2022] 1 MLRA 570, CA (refd)
R v Westminster Unions Assessment Committee; ex parte Woodward & Sons [1971] 1 KB 832 (refd)
Rustal Trading Ltd v Gill & Duffus SA [2000] 1 Lloyd's Rep 14, QBD (refd)
Tan Sri Dr Muhammad Shafee Abdullah v Tommy Thomas & Anor [2021] 6 MLJ 563; [2021] 10 CLJ 1, FC (refd)
The Government of India v Vedanta Ltd (legal successor to Cairn India Ltd) & Anor [2018] MLJU 630; [2018] CLJU 617, HC (refd)
Thyssen Canada Ltd v Mariana Maritime SA and another [2005] EWHC 219 (Comm), KBD (refd)
Vakauta v Kelly [1989] HCA 44, HC (refd)

Legislation referred to

Arbitration Act 2005 ss 7, 7(b), 10, 14(2), (3), (3)(a), (3)(b), 15, 15(1), (2), (3), (5), 16(2), 18, 18(5), (7), 37, 37(1)(a)(vi)
Legal Profession Act 1976

Appeal from: Originationg Summons Nos WA-24NCC(ARB)-25–04 of 2022 and WA-24NCC(ARB)-32–04 of 2022 (High Court, Kuala Lumpur)

Vincent Ong Liang (with Mok Yan Yee) (Tan Norizan & Assoc) for the appellant.
Nurul Qurratul Aini (with Faten Fathonah) (Mohd Ali & Co) for the respondent.

Lee Swee Seng JCA:

[1] The sole ground for this appeal is whether an arbitral award ought to be set aside for non-compliance with the arbitration agreement in that the arbitrator was not validly appointed following the procedure for appointment in the arbitration agreement between the parties. The parties, ZMSB and PSB had entered into a memorandum of agreement ('MOA') wherein payments were made by ZMSB to PSB for the iron ore extracted from the land in accordance with the agreement between the parties.

[2] The arbitration clause in the agreement reads as follows:

> 11. SETTLEMENT OF DISPUTES
>
> If at any time any question, dispute or difference of opinion shall between parties

upon or in relation to or in connection with this Agreement or any party thereof either party may forthwith give to the other notice in writing of the existence of such question, disputes or difference of opinion and the same shall be referred to the arbitration of a *person to be mutually agreed upon or failing agreement or accepted (sic) within one (1) month from the service of the notice of first nomination of arbitrator given by either party then to such person or persons as maybe appointed by the President of the Board of Engineers*, Malaysia and such reference shall be deemed to be a submission under the Arbitration Act 1952 and any statutory modification or reenactment thereof for the time being and the award of arbitrator shall be final and binding upon the parties. (Emphasis added.)

[3] A dispute having arisen between the parties, the respondent PSB gave notice of appointment of arbitrator through its solicitors, Mohd Ali & Co letter's dated 29 March 2018 to the solicitors for ZMSB, Ravi Moorthi, Noriza, Mala & Partners, proposing Mr XXX as the arbitrator of the said arbitration. The letter asked for a reply within seven days for their further action. There was a subsequent letter from PSB's solicitors to ZMSB dated 8 October 2018 where once again and this time enclosing the curriculum vitae, PSB proposed the appointment of Mr XXX as arbitrator pursuant to the court order of 14 December 2017. This time, PSB's solicitors gave the other side's solicitors 14 days to respond for their further action.

[4] PSB's solicitors, Mohd Ali & Co, by their letter dated 28 January 2019 to Mr XXX informed the said arbitrator of his appointment pursuant to cl 11 of the MOA dated 18 October 2012. The said solicitors also asked the arbitrator to confirm whether he would be agreeable to the appointment together with his scale of fees.

[5] Mr XXX by his letter dated 12 February 2019 to ZMSB, duly informed ZMSB of his nomination to act as arbitrator to hear the dispute between ZMSB and PSB. He furthered declared that he had no dealings whatsoever with the parties in the past and present.

[6] He further wrote as follows:

If you have no objection to my nomination, then, I shall proceed to fix a Preliminary Meeting (Case Management) on Wednesday 13.3.2019 at 10 o'clock in the morning at the Asian International Arbitration Centre ('AIAC'), formerly known as Kuala Lumpur Regional Centre for Arbitration ('KLRCA') in Kuala Lumpur.

[7] Then there was a long lapse of silence and it was only by a letter dated 10 July 2019 that the new solicitors for ZMSB, Jeeva Partnership, wrote to the director of AIAC quoting cl 11 of the MOA and drawing the attention of AIAC to the fact that the appointment of the arbitrator must be made by the President of the Board of Engineers, Malaysia.

[8] The said letter, which was copied to Mohd Ali & Co, solicitors for PSB, ends as follows:

> In that premise, we urge the arbitration process herein to be stayed until both parties can agree on a suitable arbitrator appointed by the board of engineers.

[9] At the first day of hearing on 19 August 2019, at the first date of hearing called by the arbitrator, the said Jeeva Partnership sent their chambering student and what transpired which is relevant is as follows as found in the minutes of the arbitration proceeding:

> LYC: So as I mentioned just now we have no objections for us to proceed today but we would like to place on record that our client reserves the right to be heard and they will not be any breach to their right to natural justice. And also we are going to contest that our client should not be punished because we have not paid the fees and so on. And also the Board of Engineers have the discretion to select the Arbitrator and it is our view that the merits of the Claim that our client is contesting is paramount. So as natural justice we will reserve our right to cross-examine the witnesses.
>
> ARB: In all circumstances there is no question natural justice must be seen and also to be done. Now we have come here to hear the opening statement. Obviously, opportunity will also be given to the Respondent to give his opening statement later to be fair to them. That is the rule of natural justice. And similarly where the witness is being cross-examined then the other side will also cross-examine the Respondent's witnesses.
>
> (Off the record matters)
>
> So the rule of natural justice is there. It is not being violated and I can give you an assurance. (See encl 16, p 411.)
>
> (NB: LYC: Lim Yi Chan, Chambering Student; ARB: Arbitrator)

[10] At the first day of hearing, the solicitors for ZMSB did not expressly raise any objection on the appointment of Mr XXX as arbitrator. Rather, their first objection to his appointment as an arbitrator was made on 10 July 2019 by way of a letter to the Director of AIAC which is some three months after the date fixed for the first preliminary meeting on 13 March 2019. In reality, the notice of objection was wrongly addressed to the Director of AIAC as AIAC has nothing to do with the arbitration other than it being the physical place of meeting for the purpose of the arbitration hearing. AIAC is not the administrative body for the arbitration nor is it the appointing authority for the arbitration.

[11] The solicitors for ZMSB raised before the Director of AIAC the issue of non compliance with the arbitration agreement on the appointment of Mr XXX as the arbitrator. It was only on 16 August 2019 that the solicitors for ZMSB wrote to the arbitrator to record its objection to his appointment as

arbitrator. The minutes of the arbitration proceeding on 17 September 2019 recorded the solicitors for ZMSB as having said:

> SJ: Oh! Yes. Before I wanted to address it in the opening of my case but I don't know where it is appropriate for me to raise this at this juncture. I will be proceeding with these proceedings with our rights to still raise an objection on the matter, with respect, your appointment was done because I think we have consistently raised that. But we will be going on purely how the Agreement is drafted and pursuant to that Agreement we say that there is a stringent manner of how an Arbitrator should be appointed. So, I will still reserve my rights to raise this in my written submission. Of course I cannot raise this during cross. So that will be the understanding.
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> ARB: That would be in your written submission.
>
> SJ: Yes as a preliminary issue.
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> ARB: In your final submission. So perhaps you can also support with your authorities that.
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> SJ: Of course.
>
> ARB: Thank you. So with that this hearing is adjourned until 2.00 p.m. Thank you very much. (See encl 16, p 433.)
>
> (NB: SJ: Shamesh Jeevaretnam, Counsel for ZMSB; ARB: Arbitrator)

[12] It was argued that the arbitrator agreed to this procedure and so the appellant proceeded with the arbitration.

AT THE HIGH COURT

[13] Several grounds were raised with respect to setting aside the award of the arbitrator wherein ZMSB was required to pay PSB the sum of RM1,382,184.80 including the ground of the arbitrator not having been validly appointed under the arbitration agreement. The High Court held that the appointment was valid under the circumstances of the case as follows:

> [40] From the chronology, the notice nominating Mr XXX as the arbitrator was sent on 8 October 2018 to ZMSB and again on 18 February 2019 to ZMSB informing it of the nomination of Mr XXX as arbitrator. In the letter PSB's solicitors stated 'In the event if you are not agreeable with the said nomination, kindly let us have your proposal on the appointment of Arbitrator failing which we shall proceed accordingly'. The objection by ZMSB was only made on 10 July 2019 when ZMSB's solicitor issued a letter to the Director of Asian International Arbitration Centre challenging the appointment of Mr XXX as the arbitrator and requested for the arbitration to be stayed. This happened more than a month after the letter from PSB's solicitor was issued. It is correct for the learned arbitrator to find that 'The Claimant served a notice on the Respondent on the appointment of Mr XXX as the arbitrator, there being no objection or disagreement from ZMSB within the stipulated contractual one-month period, the appointment of the presiding arbitrator was thus concreted'.

[14] The arbitrator in his award justified his appointment as follows:

> [72] The Tribunal took the position that there were two (2) options, first option is that a party gives to the other of the appointment of a person to be mutually agreed upon. The second option is where there is disagreement on acceptance within one(1) month of the service of notice, then such person may be appointed by President of the Board of Engineers, Malaysia. The first option had been satisfied, thus making the second option to be irrelevant and redundant. Hence, the learned Counsel for the Respondent had erred since the first option overrides the second option.

[15] The High Court upheld the validity of the appointment of Mr XXX as the arbitrator and having considered the other grounds of exceeding the scope of submission to arbitration and that the MOA was tainted with illegality, found these to be without merit and dismissed the ZMSB's application to set aside the award and correspondingly allowed the application by PSB to enforce the award.

BEFORE THE COURT OF APPEAL

[16] Learned counsel for the appalent ZMSB, withdrew all other grounds for appeal and only argued on one ground alone which is the invalidity of the appointment of the arbitrator being not in compliance with the arbitration agreement in cl 11 of the MOA.

[17] In particular, the non-compliance by PSB of the arbitration agreement in cl 11 of the MOA in that, the President of the Board of Engineers would be the party making the appointment in the event of both parties failing to agree on the appointment after 30 days of PSB notifying ZMSB of the arbitrator being nominated.

[18] It would appear that the ground for setting aside the award hinges purely on s 37(1)(a)(vi) of the Arbitration Act 2005 ('the AA 2005') which provides as follows:

> (1) An award may be set aside by the High Court only if —
>
> (a) The party making the application provides proof of that —
>
> (i) ...
>
> ...
>
> (vi) *the composition of the arbitral tribunal* or the arbitral procedure *was not in accordance with the agreement of the parties*, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act. (Emphasis added.)

[19] This judgment shall explore the issues raised under the following:

(a) whether the procedure for challenge under s 15 of the AA 2005 had been complied with;

(b) whether there had been a waiver under s 7 of the AA 2005;

(c) whether the appellant may reserve its right to have the challenge to the appointment of the arbitrator decided in the award when it is issued; and

(d) whether the appellant can set aside the award under s 37(1)(a)(vi) of the AA 2005 on the ground that the composition of the tribunal is not in accordance with the arbitration agreement.

WHETHER THE PROCEDURE FOR CHALLENGE UNDER S 15 OF THE AA 2005 HAD BEEN COMPLIED WITH

[20] Section 15 of the AA 2005 is clear in providing as follows:

> Challenge Procedure
>
> (1) Unless otherwise agreed by the parties, *any party who intends to challenge an arbitrator shall, within fifteen (15) days after becoming aware of the constitution of the arbitral tribunal* or of any reasons referred to in subsection 14(3), *send a written statement of the reasons for the challenge to the arbitral tribunal*.
>
> (2) *Unless the challenged arbitrator withdraws from office* or the other party agrees to the challenge, *the arbitral tribunal shall make a decision on the challenge*.
>
> (3) *Where a challenge is not successful, the challenging party may, within thirty (30) days* after having received notice of the decision rejecting the challenge, *apply to the High Court* to make a decision on the challenge.
>
> (4) While such an application is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.
>
> (5) No appeal shall lie against the decision of the High Court under subsection (3). (Emphasis added.)

[21] There is no suggestion that the parties had otherwise agreed to extend time with respect to the said challenge. The 15 days after becoming aware of the appointment of Mr XXX as the arbitrator may be taken to run from the date Mr XXX wrote to the solicitors of ZMSB by his letter dated 12 February 2019 on his nomination by PSB as an arbitrator and asking if ZMSB has any objection to his nomination.

[22] The conduct of ZMSB must be viewed against the backdrop of the

Court of Appeal's order dated 14 December 2017, when allowing ZMSB's appeal to have the court proceedings commenced by PSB stayed under s 10 of the AA 2005 pending ZMSB's reference of the dispute to arbitration under cl 11 of the MOA. ZMSB sat on the matter and did not make a nomination of the arbitrator and when PSB made the nomination of Mr XXX as the arbitrator on 29 March 2018, ZMSB did not respond at all even though it was the party that had wanted the dispute to be referred to arbitration.

[23] The 15 days had long lapsed when the objection to the appointment of Mr XXX was first raised in writing by Jeeva Partnership's letter to Mr XXX dated 16 August 2019.

[24] It is clear that the 15 days deadline had not been followed by ZMSB and thus the challenge on the arbitrator's appointment had not been validly made.

[25] There is no indication that the parties had agreed to extend time for this challenge to be raised under s 15(1) of the AA 2005 and in any event, there is no indication that ZMSB had applied for an extension of time to raise this challenge against the arbitrator's appointment.

[26] The rationale for the challenge of an arbitrator's appointment to be made timeously is to avoid dissipation of time, cost and expense in proceeding with an arbitration only to have it set aside on ground of an invalid appointment in that it is not in compliance with the procedure of appointment in the arbitration agreement.

[27] When confronted with a valid challenge, an arbitrator has to decide whether to withdraw from office or would so withdraw if the other party agrees to the challenge. Otherwise, the arbitral tribunal shall make a decision on the challenge.

[28] The arbitrator cannot refuse to make a decision or postpone the making of the decision to the stage of the issuance of the award. He must make a decision on the challenge unless he withdraws from office either upon being persuaded to do so or that the other party agrees to the challenge.

[29] This is to allow the challenger to take the matter up to the High Court for its decision on the challenge. Section 15(3) of the AA 2005 provides as follows:

> Where a challenge is not sucessful, the challenging party may, within thirty days after having received notice of the decision rejecting the challenge, apply to the High Court to make a decision on the challenge.

[30] In the light of the above, the decision of the arbitrator whether to withdraw from office or to continue with the arbitration is vital so that the unsuccessful party to the challenge may within 30 days after having received notice of the decision of the arbitrator rejecting the challenge, apply, to the High Court to make a decision on the challenge. The decision of the High Court is final as s 15(5) of the AA 2005 provides that no appeal shall lie against such a decision of the High Court.

[31] In the event that the arbitrator delays in making a decision challenging his appointment, then recourse may be had to s 16(2) of the AA 2005 for the aggrieved party to apply to court to terminate the mandate of the arbitrator. The arbitrator has no liberty to decide on the challenge to his appointment only at the end of the arbitration when he hands down his award when there is a specific provision in the AA 2005 on when and how the challenge is to be done and a procedure for appeal against his decision that must be strictly followed.

[32] The learned author Sundra Rajoo in *Law, Practice and Procedure of Arbitration* (2nd Ed) (Lexis Nexis, 2016) at p 334 expressed that:

> Section 15 of the Arbitration Act 2005 uses mandatory language requiring a party to issue a notice of challenge within 15 days of becoming aware of the constitution of the tribunal or the lack of qualification or circumstances giving rise to justifiable doubts as to impartility or independece.

[33] In *Rustal Trading Ltd v Gill & Duffus SA* [2000] 1 Lloyd's Rep 14, the Queen's Bench Division considered Rustal's objection to an arbitration award, which arose from concerns about arbitrators's prior involvement in a separate dispute. The court emphasised the importance of raising objections promptly, and stated that:

> (3) A party could not wait to discover whether or not an award was favourable before deciding whether to challenge the appointment of the arbitrator if the alleged irregularity was reasonably discoverable beforehand.

[34] We find that the procedure to challenge the appointment of the arbitrator had not been complied with in accordance with the strict timeframe and procedure under s 15(1) of the AA 2005 and thus, the challenge had not been effectively made with the result that the arbitrator's appointment remained intact.

[35] We affirm the arbitrator's decision to remain in office and to continue with the arbitration and the subsequent handing down of the award albeit on a different ground.

A WHETHER THERE HAD BEEN A WAIVER UNDER S 7 OF THE AA 2005

[36] Section 7 of the AA 2005 provides as follows:

B A party who knows —

(a) of any provision of this Act from which the parties may derogate; or

(b) that any requirement under the arbitration agreement has not been complied with, and yet proceeds with the arbitration without stating its objection to such non compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, *shall be deemed to have waived its right to object*. (Emphasis added.)

C

[37] As a time limit is provided for raising a challenge on the appointment of an arbitrator under s 15(1) of the AA 2005 and as s 7(b) of the AA 2005 states that if a time limit is provided for stating that objection, then if the party objecting does not do so within that period of time, then that party shall be deemed to have waived his right to object.

D

E **[38]** In *Malaysian Airline System Bhd v Competition Commission and another appeal* [2021] MLJU 2089; [2022] 1 MLRA 570, the Court of Appeal provides valuable insight into the significance of the term 'deemed'. It states that the word 'deemed':

F [111] ... is of course, a very powerful word. It brings into being a factual situation which may not in reality be there. It has the effect of creating an event or situation which ordinarily and in reality, is not even there. Lewison in *The Interpretation of Contracts* (5th Ed) at para 14.12 stated that where a deeming clause is used, it would usually be conclusive as to the deemed meaning or consequence.

G **[39]** It brings into reality a situation when the conditions are met. What is deemed cannot be un-deemed as by 'deemed' is meant 'as if it had happened'.

[40] In *Amanah Merchant Bank Bhd v Lim Tow Choon* [1994] 1 MLJ 413; [1993] 1 MLRA 102, the Supreme Court examined a crucial clause in a guarantee that specified when a notice would 'be deemed to be served.' This provision was vital because proper service of a notice of demand was necessary to establish a cause of action against the guarantor. Mohamed Dzaiddin SCJ (later CJ) interpreted the term 'shall be deemed' to mean 'shall be regarded as'.

H

I **[41]** The court explained this by highlighting a quote from Viscount Reading CJ at para 838 in *R v Westminster Unions Assessment Committee; ex parte Woodward & Sons* [1971] 1 KB 832 which observed that:

[15] ... The intention is to treat as a fact something which has not been established

as a fact — even something which can be shown not to be a fact ... A

[42] The court further explained that:

> [16] Although the words 'shall be deemed' in the above case was considered in the context of the statutory provisions, in our view, we can draw an analogy from this case that, in the present appeal, it is sufficient to prove service of the notice of demand by sending it through the post in an envelope addressed to the last known place of address of the defendant, and once this is established the deeming provision would apply as in the case cited above. B

C

[43] A 'deeming' provision is not a rebuttable presumption but conclusive as to the deemed meaning or consequence and the defendant was precluded from showing otherwise.

[44] The 15 days deadline having lapsed long time ago, the appellant ZMSB is deemed to have waived his right to object to the appointment of the arbitrator. D

WHETHER THE APPELLANT MAY RESERVE ITS RIGHT TO HAVE THE CHALLENGE TO THE APPOINTMENT OF THE ARBITRATOR DECIDED IN THE AWARD WHEN IT IS ISSUED E

[45] Here, even though the objection to the appointment was taken, it was clearly raised after a long delay and not in compliance with the strict timeframe of 15 days as provided for under s 15(1) of the AA 2005. F

[46] The appellant cannot claim the benefit of the exception to s 7 of the AA 2005 as there had been long and unexplained delay and more particularly the appellant had not raised the objection to the non compliance of the appointment of the arbitration under the arbitration agreement within the timeframe of 15 days as stimulated under s 15(1) of the AA 2005 and is therefore deemed to have waived its right to object. G

[47] Moreover, the appellant had proceeded with the arbitration in circumstance where if the final award is in its favour, the sting of his objection would have become irrelevant. It is for this reason that a party raising a serious objection on the appointment of an arbitrator must follow the strict procedure of s 15 of the AA 2005 for otherwise it would appear rather hollow an argument if it is only raised at the stage of setting aside an award only when the award is against the party raising the objection. H I

[48] It becomes a case where what is objected to as a matter of principle fades

into insignificance if finally, the award is in favour of the party objecting to the appointment of the arbitrator.

[49] It is not dissimilar to a case where the party objecting has an extra quiver or bullet to shoot only if necessary, at the end of the arbitration when the award has been delivered.

[50] Similarly, in *Thyssen Canada Ltd v Mariana Maritime SA and another* [2005] EWHC 219 (Comm), a dispute arose and both parties initially agreed during arbitration that the fire was caused by a smouldering cigarette. However, after the tribunal ruled in favour of the shipowners, Thyssen sought to overturn the award, citing new evidence that the fire was actually caused by welding in the hold.

[51] The court rejected Thyssen's challenge, holding that they could not raise objections based on new evidence after the fact, as they had accepted the cigarette explanation during arbitration. The High Court explained that:

> 18. It cannot be right for a party to participate in proceedings, which it believed to be irregular only to take advantage of any decision in its favour whilst keeping up its sleeve an objection to an irregularity which it will only raise in the event of an unfavourable decision.

[52] In the High Court of Australia in *Vakauta v Kelly* [1989] HCA 44, the appellant argued that the judge's comments during the trial indicated bias against their medical witnesses, raising concerns about a fair trial. However, the respondent countered that the appellant's failure to object at the time constituted a waiver of the right to raise the issue later. Toohey J observed as follows:

> 16. There is no reason why, in authority or in principle, a litigant who is fully aware of the circumstances from which ostensible bias might be inferred, should not be capable of waiving the right later to object to the judge continuing to hear and dispose of the case ...
>
> 17. In the result, when a party is in a position to object but takes no steps to do so, that party cannot be heard to complain later that the judge was biased ...

[53] In a similar vein, the Court of Appeal in *ASM Shipping Ltd of India v TTMI Ltd of England* [2006] 1 Llyod's Rep 401, addressed apparent bias regarding Mr Duncan Matthews QC, a third arbitrator whose prior involvement in an unrelated arbitration raised concerns for ASM Shipping Ltd. The court cautioned that:

> 6. Owners were faced with a straight choice: come to the courts and complain and seek his removal as a decision-maker or let the matter drop. They could not get themselves into a position whereby if the award was in their favour they would drop

their objection but make it in the event that the award went against them. A 'head we win and tails you lose' position is not permissible in law.

[54] Therefore, the Court of Appeal there held that the appellant's silence during the arbitration was thus treated as a waiver, barring them from contesting the arbitrator's impartiality on appeal.

[55] The strict time frame in s 15 of the AA 2005 is different from a jurisdictional challenge under s 18 where under s 18(5) of the AA 2005 a plea that an arbitral tribunal has exceeded the scope of its authority may be raised at any time during the arbitral proceedings and the arbitral tribunal may admit such plea if it considers the delay justified and under s 18(7) of the AA 2005, the arbitral tribunal may rule on its jurisdiction either as a preliminary question or as an award on its merits. There is no equivalent of s 18(7) of the AA 2005 in s 15 of the AA 2005 and so the arbitrator when confronted with the challenge must then decide either to withdraw from office or to continue in office and so to continue with the arbitration.

[56] Section 18 of the AA 2005 reads as follows:

18 *Competence of arbitral tribunal to rule on its jurisdiction*

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.

(2) For the purposes of subsection (1) —

(a) an arbitration clause which forms part of an agreement shall be treated as an agreement independent of the other terms of the agreement; and

(b) a decision by the arbitral tribunal that the agreement is null and void shall not *ipso jure* entail the invalidity of the arbitration clause.

(3) *A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence.*

(4) A party is not precluded from raising a plea under subsection (3) by reason of that party having appointed or participated in the appointment of the arbitrator.

(5) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(6) Notwithstanding subsections (3) and (5), the arbitral tribunal may admit such plea if it considers the delay justified.

(7) *The arbitral tribunal may rule on a plea referred to in subsection (3) or (5), either as a preliminary question or in an award on the merits.*

(8) Where the arbitral tribunal rules on such a plea as a preliminary question that it has jurisdiction, any party may, within thirty days after having received notice of

A that ruling appeal to the High Court to decide the matter.

(9) While an appeal is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

(10) No appeal shall lie against the decision of the High Court under subsection (8).
B (Emphasis added.)

[57] The appellant in the light of s 15(2) of the AA 2005 cannot effectively reserve its right to have its challenge to the validity of the appointment of the arbitrator decided only when the award is delivered at the end of the
C arbitration.

[58] Learned counsel for the appellant should have drawn the arbitrator's attention to the above fact and the need for him to decide one way or another and not to accede to a decision made on the challenge only at the end of the
D arbitration proceedings when the award is issued.

WHETHER THE APPELLANT CAN SET ASIDE THE AWARD UNDER S 37(1)(A)(VI) OF THE AA 2005 ON THE GROUND THAT THE COMPOSITION OF THE TRIBUNAL IS NOT IN ACCORDANCE
E WITH THE ARBITRATION AGREEMENT

[59] Section 37(1)(a)(vi) of the AA 2005 allows a party to set aside an arbitral award if the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the parties' agreement, unless the
F agreement conflicts with mandatory provisions of the Act.

[60] Where an Act has a specific provision to challenge the appointment of an arbitrator in s 15 of the AA 2005, we are of the opinion that the specific provision would prevail over a general provision in the same Act on setting
G aside an arbitral award on ground of its composition not being in accordance with the arbitration agreement under s 37(1)(a)(vi) of the AA 2005. The principle of *generalia specialibus non derogant i*s applicable as affirmed by the Federal Court in *Tan Sri Dr Muhammad Shafee Abdullah v Tommy Thomas*
H *& Anor* [2021] 6 MLJ 563; [2021] 10 CLJ 1 where in dealing with the applicability of two separate provisions in the Legal Profession Act 1976 the Federal Court applied the principle as follows:

Section 64(6) vis a vis s 99(1)

I [40] It needs to be emphasised that s 99(1) of the LPA is a special provision that deals specifically with complaints of misconduct by advocates and solicitors whereas s 64(6) is a general provision that deals generally with motions to be considered at the AGM. Applying the maxim *generalia specialibus non derogant*, s 64(6) being a general provision must give way to the special provision of s 99(1). Like any other legislation passed by Parliament, s 99(1) must be given a construction that will give

effect to its object rather than to defeat it.

[61] Parliament could not have intended to have two different provisions within the same Act having overlapping applications for that would be conducive of confusion.

[62] We are of the considered view that the challenge on the composition of the arbitral tribunal being not in accordance with the agreement in a s 37 of the AA 2005 application to set aside the award would only apply in situations where the party was only aware of the infirmity of the arbitral tribunal under s 14(3)(a) and (b) of the AA 2005 only after the award had been handed down.

[63] For instance, under s 14(3) of the AA 2005 a challenge is allowed on two grounds:

> 14(3) An arbitrator may be challenged only if —
>
> (a) he circumstances give rise to justifiable doubts as to that arbitrator's impartiality or independence; or
>
> (b) that arbitrator does not possess qualifications agreed to by the parties.

[64] There may well be cases where a party aggrieved by an award may only come to know of the above grounds after the award had been handed down. It is still not too late to challenge the composition of the arbitral tribunal as in there may be circumstances giving rise to justifiable doubt as to the arbitrator's impartiality or independence.

[65] There may be occasions where an arbitrator may lose his impartiality or independence only after the arbitration has proceeded, in which case he has the obligation to disclose as s 14(2) of the AA 2005 imposes an obligation on him to maintain his impartiality and independence throughout the arbitral proceedings. Unless the arbitrator on his own accord, discloses the circumstances generally known only to him, of his own potential lack of impartiality or independence, the aggrieved party would not be aware of it. In a case where an aggrieved party comes to know of any circumstance that may give rise to justifiable doubt as to the arbitrator's lack of impartiality or independence only after the award has been delivered, recourse can be had to s 37(1)(a)(vi) of the AA 2005 with respect to challenging the award on ground that the composition of the arbitral tribunal was not in accordance with the agreement of the parties.

[66] The learned author Sundra Rajoo in *Law, Practice and Procedure of Arbitration* (2nd Ed) (Lexis Nexis, 2016) at p 358 expressed that:

> If an arbitrator loses his independence or his impartiality subsequent to

A commencement of the arbitration proceedings, he must disclose it to the parties and if it is a panel, to other members of the arbitral tribunal. Failure to do so will invalidate the award and disentitle the arbitrator from claiming remuneration.

B **[67]** In the case *Ken Grouting Sdn Bhd v RKT Nusantara Sdn Bhd and another appeal* [2021] 4 MLJ 622 the Malaysian High Court set aside an arbitral award under s 37(1)(a)(vi) of the AA 2005 due non-compliance with the agreed procedure under the arbitration agreement. The arbitrator failed to deliver the award within the stipulated timeframe which required delivery within three months or an extension by notifying the parties. Since the arbitrator did not C extend the deadline but delivered the award significantly late, the court ruled that he acted 'without mandate or authority', leading to a loss of jurisdiction (see para 37 of the decision). Thus, the award was set aside as the arbitral procedure was not in accordance with the agreement between the parties, D satisfying the ground for setting aside under s 37(1)(a)(vi) of the AA 2005.

[68] In *The Government of India v Vedanta Ltd (legal successor to Cairn India Ltd) & Anor* [2018] MLJU 630; [2018] CLJU 617, the High Court rejected the Government of India's challenge under s 37(1)(a)(vi) of the AA 2005, E affirming that the reconstituted tribunal retained jurisdiction despite procedural delays and an arbitrator change. The High Court emphasised as follows:

F [94] It cannot be overstated that the replacement of a member of an arbitral tribunal does not change the character of the arbitral tribunal — it is still the same arbitral tribunal albeit with a different composition of members.

[69] Furthermore, the court observed that the Government of India had waived its right to object by continuing with the proceedings without raising G any concerns over the replacement and cited article 30 of the UNCITRAL Rules (similar to s 7 of the AA 2005) which provides that:

[92] *Article 30 of the UNCITRAL Rules further provides*:

H A party who knows that any provision of, or requirement under, these Rules has not been complied with and yet proceeds with the arbitration without promptly stating his objection to such non-compliance, shall be deemed to have waived his right to object.

[70] In the case before us, the appellant was fully aware and took the stand I that the arbitrator was not validly appointed as it is the President of the Board of Engineers that should be appointing the arbitrator since the parties could not agree on the appointment of the arbitrator. By participating in the arbitration, the appellant cannot effectively reserve its right to object only after the award has been delivered in case the award is not in its favour.

DECISION

[71] Thus, we found that the single ground for setting aside the arbitral award to be without merits and so we dismissed the appeal with costs of RM20,000 subject to allocator.

[72] We affirm the decision of the High Court on the validity of the appointment of the arbitrator but on a slightly different ground in that the procedure for challenge of the appointment of the arbitrator had not been complied with. The consequence was that the appellant ZMSB was deemed to have waived its right to challenge the appointment of the arbitrator.

Appeal dismissed with costs.

Reported by Muhammad Azham Marwan